United States Department of Labor
Employees' Compensation Appeals Board

B.L., Appellant	)	
and	)	**Docket No. 17-1813**
	)	**Issued: May 23, 2018**
U.S. POSTAL SERVICE, MARGATE POST OFFICE, Margate City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 23, 2017 appellant, through counsel, filed a timely appeal from April 7 and June 12, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether OWCP abused its discretion in denying authorization for requested right hip replacement surgery; and (2) whether appellant met his burden of proof to

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

establish a right knee or hip condition commencing January 29, 2016 causally related to factors of his federal employment from January 26 through 28, 2015.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on January 26, 2006 appellant, then a 54-year-old custodian, sustained a right medial meniscus tear when he stepped on a pallet jack while dumping trash and fell, twisting his right knee. He underwent right knee arthroscopy on February 14, 2006.[4] OWCP also accepted that on November 30, 2007 appellant sustained left shoulder and right knee injuries when his right knee gave way while moving a floor mat. Appellant asserted that he injured his "pelvis" when he fell to the floor. Following the injuries, he returned to full duty for approximately one year and was then assigned modified duty.

A November 30, 2007 right hip x-ray demonstrated shortening of the right femoral neck without obvious fracture or dislocation, possibly due to a congenital or developmental cause.

Dr. Glenn Zuck, an attending osteopath Board-certified in orthopedic surgery, performed an authorized repeat right knee arthroscopy on April 1, 2008, with partial medial and lateral meniscectomies, chondroplasty, and debridement of a partial anterior cruciate ligament tear. In a November 22, 2010 report, he obtained right hip x-rays demonstrating "changes about the humeral head and proximal femur consistent with his preexisting diagnosis as a child [of] Legg-Calve-Perthes disease."[5]

Dr. Alvin Ong, an attending Board-certified orthopedic surgeon, submitted reports from November 3, 2011 to May 21, 2013 in which he summarized appellant's treatment for the accepted injuries. On examination he found restricted motion of the right hip in all planes, a 0.25 inch leg length discrepancy with the right leg shorter than the left. Dr. Ong obtained right hip x-rays which demonstrated significant dysplasia "with evidence of previous Legg-Perthes syndrome." He diagnosed right hip dysplasia with Legg-Perthes syndrome accelerated and exacerbated by the accepted injury. Dr. Ong also found continuing degeneration of the right knee. He opined that appellant required a total right hip arthroplasty. Dr. Ong requested that OWCP authorize the procedure.

On June 7, 2013 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon, regarding whether the requested right hip arthroplasty was causally

[3] Docket No. 15-1216 (issued September 22, 2016); Docket No. 11-0213 (issued September 21, 2011).

[4] OWCP accepted the claim under File No. xxxxxx381, which it later doubled with the present claim, File No. xxxxxx341. It also authorized an arthroscopic left rotator cuff repair, performed on June 13, 2008.

[5] On January 3, 2012 OWCP obtained a second opinion from Dr. Kenneth P. Heist, Board-certified in orthopedic surgery. Dr. Heist related appellant's complaints of right knee instability, and right hip pain and stiffness. He found restricted right hip motion in all planes and degenerative arthritis of both knees. Dr. Heist opined that appellant had "degenerative joint disease that has been accelerated by his employment."

related to the accepted injuries. Dr. Askin reviewed the medical record and a statement of accepted facts (SOAF). He noted that appellant had insulin dependent diabetes mellitus and was obese. On examination Dr. Askin observed a right-sided limp, a right knee effusion, medial compartment osteoarthritis of the right knee, and limited right hip motion. He opined that appellant's degenerative arthritis of the right knee and rip hip was caused primarily by morbid obesity.

By decision dated June 21, 2013, OWCP denied appellant's request to authorize a right hip arthroplasty, based on Dr. Askin's opinion. Following additional development,[6] it issued December 6, 2013 and March 17, 2015 decisions which affirmed the denial of requested right hip arthroplasty.

On January 26, 2015 appellant returned to sedentary work for four hours a day clearing carriers and performing clerical duties.

In January 29 and April 2, 2015 reports, Dr. Ong opined that walking back and forth across the plant floor from January 26 to 29, 2015 worsened the accepted occupational injuries worsened and aggravated preexisting Legg-Perthes disease and osteoarthritis of the right hip.

On May 11, 2015 under File No. xxxxxx985, appellant claimed a recurrence of disability (Form CA-2a) commencing January 29, 2015. He contended that on January 26, 2015, he was assigned to process new routes which required him to walk across the plant floor several times a day. Appellant asserted that walking at work caused a significant increase in right knee and right hip pain. He stopped work on January 29, 2015 and did not return. OWCP administratively converted the recurrence claim to one for occupational disease and processed it under OWCP File No. xxxxxx341.

To assess the nature and extent of appellant's right knee condition under OWCP File No. xxxxxx985, OWCP obtained a second opinion on May 12, 2015 from Dr. Noubar Didizian, a Board-certified orthopedic surgeon. Dr. Didizian reviewed the medical record and a SOAF. On examination, he observed a Trendelenburg gait on the right, limited right hip motion, and crepitation in both patellae. Dr. Didizian opined that appellant's right knee had deteriorated such that he would require a total right knee arthroplasty. He commented that appellant's Legg-Perthes disease of the right hip had progressed naturally to degenerative osteoarthritis, independent of the accepted injuries or other external factors. Dr. Didizian opined that appellant could perform sedentary duty for four hours a day.

In an October 20, 2015 development letter, OWCP notified appellant of the type of additional evidence needed to establish his claim for a new occupational disease of the right knee and right hip. It requested that he submit factual evidence corroborating the identified work factors, and a medical report explaining how and why those duties would cause the claimed right hip and knee conditions. OWCP afforded appellant 30 days to submit such evidence.

[6] Counsel submitted reports from Dr. Ong dated from January 7, 2014 to January 29, 2015. Dr. Ong opined that the accepted January 26, 2006 employment incident exacerbated quiescent Legg-Perthes disease, precipitating degeneration and eventual immobility of the right hip.

By decision dated December 18, 2015, under OWCP File No. xxxxxx341, OWCP denied appellant's occupational disease claim for a right hip and knee condition commencing January 29, 2015.

In a December 29, 2015 letter, counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, held April 18, 2016. At the hearing, appellant stated that he began work at the employing establishment as a clerk on February 14, 1987, and transitioned to the custodial craft in 2005. After the two accepted injuries, he performed full-duty custodial work for about one year, then was assigned to part-time light duty as a custodian. Appellant was subsequently assigned to clear carrier accountables, a sedentary clerical job, for four hours a day. He alleged that, in December 2014, he was informed that his job had been abolished. Appellant accepted a sedentary clerical position in late December 2014. When he reported for duty on January 26, 2015, he was assigned work that required him to walk across the plant floor several times a day, a distance of at least 100 feet. Appellant asserted that walking on the plant floor aggravated his right hip and right knee, totally disabling him.

Appellant submitted additional medical evidence. On March 15, 2016 Dr. Ong reviewed Dr. Didizian's opinion. He attributed appellant's right knee and right hip conditions to the January 26, 2006 and November 30, 2007 accepted injuries. Dr. Ong opined that appellant was unable to perform his light-duty job as of January 2015 as his right hip and knee deformities, leg length discrepancy, and significant antalgic gait disabled him from walking across the workroom floor as required by his new duties. He opined that appellant required total right hip and right knee replacements. A June 30, 2006 progress report noted that appellant planned to participate in a weight reduction program before having surgery.

By decision dated July 5, 2016, under OWCP File No. xxxxxx341, an OWCP hearing representative set aside the December 18, 2015 decision, finding that Dr. Ong's reports were sufficient to warrant additional development. OWCP directed that on remand of the case, appellant, the medical record, and a SOAF should be referred to an appropriate specialist to ascertain if his work duties caused or aggravated his right hip and right knee conditions.

By decision dated September 22, 2016,[7] the Board set aside OWCP's March 17, 2015 decision finding that there was a conflict of medical opinion between Dr. Ong, for appellant, and Dr. Askin, for the government, regarding the etiology of appellant's right hip condition. The Board directed OWCP to refer appellant to an impartial medical examiner to resolve the conflict.

On remand of the case, under OWCP File No. xxxxxx985, OWCP selected Dr. Ian B. Fries, a Board-certified orthopedic surgeon, as impartial medical examiner. It provided him a September 27, 2016 SOAF which listed the accepted injuries and authorized surgeries, and summarized appellant's work history.

[7] Docket No. 15-1216 (issued September 22, 2016).

Dr. Fries provided a November 15, 2016 report[8] in which he reviewed the medical record and SOAF. He commented that there were no medical records from the January 26, 2006 occupational injury. Dr. Fries noted that appellant had related a knee injury while playing football in high school, which required "a likely open medial meniscectomy." Appellant was also injured in a 1981 motor vehicle accident, which "fractured his pelvis and ribs." On examination Dr. Fries observed an antalgic gait, inability to bear full weight on his right leg, a 20 degree flexion contracture of the right knee, severely restricted motion of the lumbar spine and right hip, surgical scars of the right knee, severely restricted lumbar motion, and morbid obesity. Appellant also had insulin-dependent diabetes mellitus. Dr. Fries diagnosed Legg-Perthes disease of the right hip with secondary degenerative osteoarthritis, degenerative osteoarthritis of the right knee, diabetes mellitus, bilateral diabetic neuropathy and edema of the lower extremities, atrial fibrillation, and morbid obesity. He opined that appellant's right hip condition was attributable entirely to congenital Legg-Perthes disease, an idiopathic condition that progressed naturally to degenerative osteoarthritis unrelated to any musculoskeletal trauma. Dr. Fries noted that, while a right hip arthroplasty might be medically necessary, it was unrelated to the accepted injuries. He commented that appellant was a poor surgical candidate due to obesity, diabetes, and cardiac issues.

On December 8, 2016 OWCP doubled OWCP File No. xxxxxx341 with OWCP File No. xxxxxx985, with the latter as the master claim number.

By decision dated December 13, 2016, under File No. xxxxxx341, OWCP denied appellant's claim for a new occupational disease commencing January 29, 2016, based on Dr. Fries' opinion as the weight of the medical evidence.

In a December 21, 2016 letter, OWCP requested that Dr. Fries review additional medical records regarding the January 26, 2006 employment injury from OWCP File No. xxxxxx381, and indicate any change in his prior opinion.

In a December 23, 2016 letter, appellant advised that the limited-duty job he accepted was for four hours of sedentary duty daily with no walking. Upon reporting January 26, 2015, the postmaster added additional carrier routes to appellant's clearance duties, which required him to walk approximately 100 feet across the plant floor several times a day.

Pursuant to the July 5, 2016 remand decision, under OWCP File No. xxxxxx341, OWCP obtained a January 6, 2017 second opinion report from Dr. William Dinenberg, a Board-certified orthopedic surgeon. Dr. Dinenberg reviewed the medical record and a SOAF. On examination he observed an antalgic gait and significantly restricted right hip motion. Dr. Dinenberg opined that appellant's preexisting Legg-Perthes disease of the right hip was aggravated and accelerated by the November 30, 2007 employment injury, which resulted in degenerative changes that would require a total right hip arthroplasty. Appellant also required a total right knee arthroplasty. Dr. Dinenberg opined that appellant remained totally disabled for work due to sequelae of the accepted injuries.

[8] The first page of the report is dated November 15, 2016. The subsequent pages of the report are dated November 17, 2016.

In a January 9, 2017 supplemental report, Dr. Fries noted that appellant had a right knee injury in adolescence while playing football, which required an arthroscopy to repair a probable torn ACL and meniscus. As appellant had a second right medial meniscal tear on January 26, 2006 with two subsequent surgeries, his right knee was likely not functioning normally before November 30, 2007. Dr. Fries opined that the medical record prior to November 30, 2017 did not document a right hip injury. He explained that appellant's "advancing right hip degenerative arthritis secondary to Legg-Perthes disease [was] not due to work-related injury sustained on November 30, 2007" or to any other employment factor."

By decision dated January 31, 2017, OWCP denied appellant's request to authorize a total right hip arthroplasty, based on Dr. Fries' opinion.

In a February 7, 2017 letter, counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, held May 9, 2017. At the hearing, he contended that Dr. Fries' opinion was insufficient to resolve the conflict of medical opinion as it was incomplete and poorly rationalized.

By decision dated April 7, 2017, OWCP affirmed the denial of a new occupational disease claim under OWCP File No. xxxxxx341. It accepted that appellant walked 100 feet across the plant floor several times a day from January 26 to 29, 2015 as alleged. OWCP found, however, that the medical evidence of record did not support a causal relationship between the accepted work factors and a right knee or hip condition.

By decision dated June 12, 2017, under OWCP File No. xxxxxx985, OWCP denied authorization of a total right hip replacement, based on Dr. Fries' opinion as the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[9]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[10] The only limitation on OWCP's authority is that of reasonableness.[11] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence

[9] 5 U.S.C. § 8103.

[10] *Vicky C. Randall*, 51 ECAB 357 (2000).

[11] *Lecil E. Stevens*, 49 ECAB 673 (1998).

could be construed so as to produce a contrary factual conclusion.[12] For a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[13]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[14] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[15]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for a right medial meniscus tear sustained on January 26, 2006 when he stepped on a pallet jack, and left shoulder and right knee injuries sustained on November 30, 2007 when he fell while moving a floor mat. It authorized a February 14, 2006 right knee arthroscopy, an April 1, 2008 right knee arthroscopy, and June 13, 2008 arthroscopic left rotator cuff repair. Dr. Ong subsequently requested that OWCP authorize a total right hip arthroplasty.

As noted, on a prior appeal,[16] the Board found a conflict in the medical evidence between Dr. Ong, for appellant, and Dr. Askin, for OWCP, with regard to whether the proposed right hip arthroplasty was necessitated by the accepted January 26, 2006 and November 30, 2007 employment injuries. To resolve the conflict, it properly referred appellant to Dr. Fries, a Board-certified orthopedic surgeon, pursuant to section 8123(a) of FECA, for an impartial medical examination and an opinion on the matter.[17]

The Board finds that the well-rationalized opinion of Dr. Fries constitutes the special weight of the medical evidence regarding whether the requested right hip arthroplasty would be necessitated by residuals of appellant's January 26, 2006 and November 30, 2007 work injuries.

In his November 16, 2016 and January 9, 2017 reports, Dr. Fries accurately described appellant's history and presented a thorough review of his medical records from both traumatic injury claims and the occupational disease claim. He also provided detailed findings on clinical examination. Dr. Fries explained that appellant's congenital Legg-Perthes disease was idiopathic in nature and had progressed in the expected manner according to the medical literature. He

[12] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[13] *R.C.*, 58 ECAB 238 (2006).

[14] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[15] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[16] *See supra* note 7.

[17] 5 U.S.C. § 8123(a).

emphasized that the course of Legg-Perthes disease was unaffected by the accepted injuries or any other external musculoskeletal trauma.

The Board finds that Dr. Fries' opinion that the need for the recommended total right hip arthroplasty was not causally related to the accepted injuries is entitled to the special weight accorded a referee examiner and represents the weight of the evidence.[18] The evidence establishes that the need for right hip surgery was not causally related to the accepted conditions. OWCP did not abuse its discretion in denying authorization.[19]

On appeal counsel contends that Dr. Fries' opinion is of insufficient probative value to resolve the conflict of opinion as it was based on an inaccurate SOAF that did not refer to diagnostic imaging performed after the 2006 and 2007 employment injuries.[20] The Board finds, however, that the SOAF accurately listed appellant's accepted injuries and authorized surgeries. Also, the medical record provided to Dr. Fries contained the imaging studies performed after both accepted injuries. Dr. Fries mentioned those studies in his reports.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[21] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[22] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[23]

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.[24] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which

[18] *Manuel Gill*, 52 ECAB 282 (2001).

[19] *L.D.*, 59 ECAB 648 (2008).

[20] *T.G.*, Docket No. 07-2231 (issued June 2, 2008) in support of the proposition that a physician's report is not entitled to the weight of the medical evidence if based on an inaccurate SOAF); *A.C.*, Docket No. 07-2423 (issued May 15, 2008); and counsel cited to *Gwendolyn Merriweather*, 50 ECAB 11 (1999).

[21] *Supra* note 2.

[22] *Joe D. Cameron*, 41 ECAB 153 (1989).

[23] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[24] 20 C.F.R. § 10.5(q).

compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[25]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[26] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[27]

ANALYSIS -- ISSUE 2

On May 11, 2015 appellant claimed that he sustained right knee and right hip pain which he attributed to increased walking at work from January 26 to 29, 2015. In support of his claim, he provided January 29 and April 2, 2015 reports from Dr. Ong. Dr. Ong opined that walking back and forth across the plant floor from January 26 to 29, 2015 worsened the accepted right hip and knee injuries, and worsened and aggravated Legg-Perthes disease and osteoarthritis of the right hip.

OWCP obtained a second opinion from Dr. Didizian who opined in a May 12, 2015 report that appellant had significant degeneration of the right knee and hip. Dr. Didizian attributed appellant's right knee condition to the accepted November 30, 2007 injury, and the right hip condition to idiopathic Legg-Perthes disease.

OWCP initially denied the claim by decision dated December 18, 2015 and set aside by July 5, 2016 decision with instructions to refer appellant for a second opinion to determine if his work duties caused or aggravated the right hip and knee conditions. It referred appellant to Dr. Dinenberg who provided a January 6, 2017 report. Dr. Dinenberg did in fact opine that the

[25] *Solomon Polen*, 51 ECAB 341 (2000).

[26] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[27] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

November 30, 2007 occupational injury aggravated and accelerated appellant's Legg-Perthes disease of the right hip.

Dr. Ong opined that walking at work from January 26 to 29, 2015 caused a worsening of appellant's right knee and hip symptoms. In contrast, Dr. Didizian and Dr. Dinenberg attributed appellant's condition to sequelae of the November 30, 2007 employment injury. The Board finds that this difference of medical opinion constitutes a conflict of medical opinion requiring resolution by an impartial medical examiner.[28]

On remand of the case, OWCP shall prepare an updated SOAF and refer it, the medical record, and appellant to an appropriate specialist or specialists to resolve the conflict regarding whether increased walking at work from January 26 to 29, 2015 caused or aggravated any medical condition. Following this and any other development deemed necessary, it shall issue a *de novo* decision in the case.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying authorization for requested right hip replacement surgery. The Board further finds that the second issue is not in posture for a decision.

[28] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 12, 2017 is affirmed, and the April 7, 2017 decision set aside and the case is remanded for additional development consistent with this decision.

Issued: May 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board